BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 98-016-S - ORDER NO. 98-883

NOVEMBER 9, 1998

IN RE: Petition of Midlands Utility, Inc. for a Declaratory Order Concerning Service to Gordon Amick Property at 4027 Delree Street, West Columbia.	))))	ORDER DENYING PETITION FOR RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina on the Petition for Reconsideration filed by Gordon L. Amick ("Amick") in the above-captioned matter. By his Petition for Reconsideration, Amick requests reconsideration of Commission Order No. 98-334, dated May 8, 1998, by which the Commission denied Amick's Motion to Dismiss for Lack of Jurisdiction and of Commission Order No. 98-710, dated September 15, 1998, by which the Commission issued its final ruling in this matter. Amick asserts three issues in his Petition for Reconsideration. For the reasons discussed below, the Commission denies Amick's Petition for Reconsideration.

ISSUE 1

Whether the subject matter of Midlands' Petition is a private contract beyond the scope of the power and jurisdiction of the Commission?

This matter was instituted by a Petition for Declaratory Order filed by Midlands Utility, Inc. ("Midlands"). By its Petition for Declaratory Order, Midlands requested a declaration of rights and obligations between itself and its customer Amick. In response to Midlands' Petition for Declaratory Order, Amick filed an Answer and a Motion to

Dismiss for Lack of Jurisdiction. By Order No. 98-334, dated May 8, 1998, the Commission found that it had jurisdiction over this matter pursuant to S.C. Code Ann Section 58-5-210 (1976) and the regulations of the Commission, specifically 26 S.C. Code Regs. 103-500, 103-503, and 103-533, and thus the Commission denied Amick's Motion to Dismiss. Amick now asserts in his Petition for Reconsideration that the Commission erred in denying his Motion to Dismiss for Lack of Jurisdiction.

Section 58-5-210 is the legislature's general grant of authority to the Commission and empowers the Commission to establish just and reasonable standards, classifications, and regulations to be followed by every public utility in South Carolina. Pursuant to this statutory mandate, the Commission has promulgated regulations to govern sewer services by public utilities. See, 26 S.C. Code Reg. 103-500 (Supp. 1997).

26 S.C. Code Reg. 103-503 controls the rates and charges imposed by all sewerage utilities operating in the state, and it prohibits a utility from imposing a rate or charge until approved by the Commission. Regulation 103-503 also prohibits any sewerage utility from charging different rates to customers within a given classification, unless reasonable justification is shown for the different rate and a contract or tariff setting the different rate has been filed and approved by Commission order or directive. 26 S.C. Code Reg. 103-533 controls the extent to which a sewage utility may collect from a customer when the utility has undercharged the customer.

Amick asserts that the subject matter of the proceeding is a private contract which is beyond the jurisdiction of the Commission. In support of his argument, Amick cites Lindler v. Baker, 280 S.C. 130, 311 S.E.2d 99 (Ct.App.1984) and Martin v. Carolina

Water Services, Inc., 273 S.C. 43, 254 S.E.2d 52 (Ct.App.1979). In Order No. 98-334, the Commission noted that both cases cited by Amick are factually distinguishable from the matter presently before the Commission as the factual situations of both cases predate the Commission's regulations governing sewerage utilities. Thus the Commission regulations governing service provided by sewerage utilities in this state would apply to situations arising after the passage of the regulations rather that the cases which preceded the passage of the regulations.

In Anchor Point v. Shoals Sewer Company, 308 S.C. 422, 418 S.E.2d 546 (1992), the Supreme Court of South Carolina, in rejecting an argument that the Commission's rate establishment unconstitutionally impairs the right to contract, held that the "right to contract is not absolute; it is subject to the state's police powers which may be exercised for the protection of the public's health, safety, morals, or general welfare." Anchor Point, 418 S.E.2d at 550. The Court held that the Commission under the state's police powers may establish rates for a public utility even where there was a pre-existing contract in a master deed which purported to control those rates. Thus, the Supreme Court recognized the Commission's jurisdiction over a matter involving the rates for service of a public utility even though there was a contract (i.e. the master deed) which attempted to control the rates for service.

Therefore, based upon the statutory authority of the Commission as found in S.C. Code Ann. Section 58-5-210, the regulations of the Commission, and the Anchor Point case which illustrates that a private contract does not divest the Commission of jurisdiction over matters concerning rates for a utility's service, the Commission finds

and concludes that it has jurisdiction to determine the rights and obligations between Midlands, a public utility, and its customer Amick as requested in the Petition for Declaratory Order. To find that the May 23, 1985 agreement was outside the scope of the Commission's jurisdiction would negate the authority and responsibility of the Commission to approve and establish rates as well as negate the responsibility of the Commission to approve contracts for service setting forth a different rate. The Commission finds no error in its decision to deny Amick's Motion to Dismiss for Lack of Jurisdiction as contained in Order No. 98-334, dated May 8, 1998.

ISSUE 2

Whether the May 23, 1985, letter from Midlands to Amick offered sewer service at no cost to Amick as consideration for Amick granting an easement to Midlands?

In Order No. 98-710, dated September 15, 1998, the Commission found that the May 23, 1985, letter between Midlands and Amick was an agreement in which Midlands agreed to reserve 50 gallons per minute capacity in its nearby pump station and force main sewer line in exchange for Amick granting Midlands an easement. In making this finding, the Commission rejected Amick's assertion that the May 23, 1985, letter was an agreement which purported to grant to Amick 50 gallons per minute of sewer service in perpetuity in exchange for the easement.

By his Petition for Reconsideration, Amick asserts that the Commission erred (1) in failing to apply the law with regard to resolving ambiguities against the party who prepares a contract when terms of the contract are susceptible of more than one reasonable interpretation; (2) in ignoring testimony and failing to provide the applicable

law with regard to Midlands' use of the industry-specific terms; (3) in failing to construe against Midlands the use of industry-specific terms without definition in the letter when Midlands knew or should have known that Amick would not understand the industry-specific meaning of such terms; and (4) in applying the "plain, ordinary meaning" standard to the industry-specific term "capacity" and not applying the same standard to the industry-specific term "provide," and ignoring the ambiguity created by the use of the word "provide" without an industry-specific definition.

In Order No. 98-719, dated September 15, 1998, the Commission found that Midlands reached an agreement with Amick whereby Midlands agreed to reserve 50 gallons per minute capacity in its nearby pump station and force main sewer line in exchange for a utility easement. The Commission further found that the term "capacity" as used in the May 23, 1985, letter is a term of art used by utilities to describe the amount of wastewater flow which can be accommodated by a utility's facilities. The Commission also found that the term "capacity" would be given the same interpretation according to its plain, ordinary meaning and cited to Webster's Ninth New Collegiate Dictionary (1989) as defining "capacity" as "the potential or suitability for holding, storing or accommodating."

Amick contends that the Commission failed to apply the law with regard to resolving ambiguities against the party who prepares a contract when the terms of the contract are susceptible of more than one reasonable interpretation. As the discussion accompanying the Commission's findings and conclusion in Order No. 98-710 illustrates, the Commission did not believe Amick's interpretation of the contract to be reasonable as

Amick's interpretation would violate the law regarding filed tariffs as found in S.C. Code Ann. Section 58-5-210 and the requirement of 26 S. C. Code Regs. 103-503(D) that the Commission approve special contracts for service. The Commission also determined that Midlands had no compelling reason to grant Amick free sewer service in perpetuity in exchange for the utility easement as Midlands had access through its own property and in the public right-of-way. There was no topographical reason or financial advantage to Midlands to have the line cross Amick's property versus the route across Midlands property and along the public right-of-way. The record is devoid of any fact which could create a matter of necessity for Midlands to obtain the easement from Amick. Further, Midlands possessed the statutory power to condemn Amick's property for the easement, if as a public utility it was necessary to route the facilities over Amick's property. The Commission also noted that the value of providing free sewer service perpetually would greatly exceed the value of the utility easement on Amick's property.

> Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable fair and just, the latter construction must prevail.

Valley Public Service Authority v. Beech Island Rural Community Water District, 319 S.C. 488, 462 S.E.2d 296, 299 (Ct.App.1995); C.A.N. Enterprises, Inc. v. S.C. Health and Human Services Finance Commission, 296 S.C. 373, 373 S.E.2d 584 (1988); Farr v. Duke Power Co., 265 S.C. 356, 218 S.E2d 431, 434 (1975). Thus, as Midlands had no compelling reason to acquire the easement from Amick, the Commission believes that Amick's interpretation of the May 23, 1985 letter is extraordinary and not reasonable.

Therefore, the Commission does not believe it erred in not interpreting the agreement as Amick proposed.

Furthermore, as stated in Order No. 98-710, Amick's interpretation would ignore the laws relating to contracts with public utilities. The Commission concluded in Order No. 98-710 that Amick's interpretation of the May 23, 1985, letter violates the law regarding filed tariffs. See, S.C. Code Ann. Section 58-5-210. The Commission also determined that Midlands was required by law to charge Amick the same rate as similarly situated customers unless prior approval from the Commission was obtained. 26 S.C. Code Regs. 103-503. The Commission further concluded that Midlands was required by law to obtain Commission approval of any special contract for service pursuant to 26 S.C. Code Regs. 103-503(D).

The Commission noted in Order No. 98-710 that it is well settled that all laws of the state that relate to the subject of the contract are part of that contract. "It is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is part of the contract." City of North Charleston v. North Charleston District, 289 S.C. 438, 346 S.E.2d 712 (1986). "Every contract entered into in this state embodies in its terms all applicable laws of the state just as completely as if the contract expressly so stipulated." Ayers v. Crowley, 205 S.C. 51, 30 S.E.2d 785, 788 (1944). As the Commission stated in Order No. 98-710, Amick's interpretation of the May 23, 1985, letter as a contract for free sewer service circumvents the Commission's regulations and abrogates the authority of the Commission to approve contracts. The

Commission's interpretation of the contract as reserving capacity in the system is consistent with the laws of the state in effect at the time of the contract.

Amick next asserts error by the Commission in failing to apply the applicable law with regard to Midlands' use of the industry-specific terms "provide" and "capacity". In Order No. 98-710, the Commission found that the term "capacity" as used in the May 23, 1985, letter was a term of art used by sewerage utilities to describe the amount of wastewater flow that can be accommodated by the utilities' facilities. The Commission also found that the term would be given the same interpretation according to its plain, ordinary meaning. Therefore, Amick's argument that Amick was not familiar with the industry and industry-related terms is irrelevant.

Amick also asserts that the Commission erred in failing to apply an industry-specific standard to the word "provide." Webster's Ninth New Collegiate Dictionary (1989) defines "provide" as "to take precautionary measures," "to make preparation to meet a need," "to prepare or get ready in advance," or "to make something available." "The general rule of contract construction requires that language used in a contract must be interpreted in its natural and ordinary sense." Twenty Ninth Ave. Corp. v. Great Atlantic & Pacific Tea Co., 428 S.E.2d at 735 (Ct. App.1993). The Commission discerns no error in applying the plain, ordinary meaning of "provide" in this case. The application of the plain, ordinary meaning of "provide" with the plain, ordinary meaning of the term "capacity" does not lead an ambiguity as alleged by Amick. As the definition indicates, "provide" does not mean "give" or "free." The Commission's interpretation of the May 23, 1985, letter giving "capacity" and "provide" their plain, ordinary meanings

leads to the reasonable reading of the contract that Midlands agreed to take precautionary measures to ensure that it could accommodate up to 50 gallons per minute of wastewater flow from Amick.

Based on the foregoing discussion, the Commission discerns no error in its determination regarding the interpretation of the May 23, 1985, letter as an agreement in which Midlands agreed to reserve 50 gallons per minute capacity in its nearby pump station and force main sewer line in exchange for Amick granting Midlands a utility easement. In fact, the Commission believes that its interpretation of the May 23, 1985, letter as reserving of capacity in the Midlands' system is an interpretation which is consistent with the law in effect at the time the agreement was made.

ISSUE 3

Whether Midlands should be equitably estopped from charging past sewer and tap fees?

Finally, Amick asserts that the Commission erred in failing to apply the doctrine of equitable estoppel to bar Midlands from charging and collecting past sewer charges. Amick contends that Midlands' silence with regard to sewer charges being due from 1985 through 1997 was consistent with Amick's interpretation of the May 23, 1985, agreement, and therefore, Midlands is estopped from collecting past sewer charges.

"Estoppel by silence arises when the estopped party owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe an erroneous state of facts." Provident Life and Accident Insurance Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924, 928 (Ct.App.1994).

> In order to successfully assert the estoppel defense, the party must show (1) conduct by the plaintiff calculated to convey the impression that the facts are otherwise than and inconsistent with the position he subsequently asserts in his cause of action; (2) plaintiff's intention or expectation that the defendant will act upon such conduct; (3) plaintiff's knowledge, actual or constructive, of the facts; (4) defendant's lack of knowledge of the facts; (5) defendant's reasonable reliance on plaintiff's prior inconsistent conduct; and (6) defendant's detrimental change of position as a result of his reliance.

South Carolina Electric & Gas Co. v. Hix, 306 S.C. 173, 410 S.E.2d 582, 585 (Ct.App.1991).

The evidence presented at the hearing indicated that Midlands did not learn of an interconnection between the Amick property and the Midlands line until 1996 when the Department of Health and Environmental Control became involved in the matter of a damaged sewerage tank on Amick's property. Amick himself testified that the interconnection was made by someone other than himself during a period when he did not have possession of the property, and Amick could not give an exact time when the interconnection with the Midlands system was made.

The Commission finds that Midlands is not estopped from recovering past charges. Once Midlands was informed that the Amick property was interconnected to the Midlands system, Midlands began to try to collect for past charges and tap fees. Midlands could not seek payment for charges until Midlands became aware that there was an interconnection to the property and service was being rendered. Midlands could not have or owe a duty to speak about the sewer charges until Midlands became aware that the charges were due. Therefore, the Commission concludes that there is no estoppel created by the silence of Midlands.

In addition, "reliance by the party seeking to assert estoppel must be reasonable." Southern Development Land and Golf Co., Ltd. v. S.C. Public Service Authority, 311 S.C. 29, 426 S.E.2d 748, 751 (1993). "Estoppel may not be invoked to nullify a mandatory statutory restriction. A party cannot claim reasonable reliance on a representation by another in the face of a clear statutory mandate." Freeman v. Fisher, 288 S.C. 192, 341 S.E.2d 136, 137 (1986). The Commission concluded in Order No. 98-710 that Amick's interpretation of the May 23, 1985, agreement violated the law regarding filed tariffs as contained in S.C. Code Ann. Section 58-5-210 and the requirement of Commission approval of special contracts for service pursuant to 26 S.C. Code Regs. 103-503(D). Based on the Commission's finding that the filed rate doctrine as contained in S.C. Code Ann. Section 58-5-210 is applicable and applying the holding from Freeman v. Fisher that estoppel may not be invoked to nullify a mandatory statutory restriction, the Commission finds and concludes that estoppel is not a proper defense in this matter as the defense of estoppel, if proper, would nullify the statutory restrictions concerning filed tariffs.

For the foregoing reasons, the Commission concludes that Midlands is not equitably estopped from collecting past sewer charges.

CONCLUSION

Having examined Commission Order No. 98-334, dated May 8, 1998, and Order No. 98-710, dated September 15, 1998, in light of Amick's Petition for Reconsideration

and finding no discernable error in the Commission's determinations in Orders No. 98-334 and 98-710, the Commission denies Amick's Petition for Reconsideration.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)